RSA 53/2001
BEFORE
HON'BLE MR. JUSTICE B.P. KATAKEY

This appeal by the plaintiffs Nos. 1 to 6 in Title Suit No. 70/1992 is directed against the judgment and decree dated 5.3.2001 passed by the learned Civil Judge (Senior Division) (now Civil Judge), Dhubri in Title Appeal No. 9/1999, dismissing the suit of the plaintiffs by reversing the judgment and decree dated 1.3.1999 passed by the learned Civil Judge (Junior Division) No. 2 (now Munsiff No. 2), Dhubri in the aforesaid suit.

2. The present appellants along with Ajiron Bewa instituted the aforesaid suit against the present respondent as defendant praying for a decree declaring the sale deed No. 122/1986 dated 5.2.1986 executed in favour of the defendant is forged and fraudulent and also for declaring the right, title and interest of the plaintiffs Nos. 1 to 6 in respect of the Schedule 'C' land measuring 2 bighas 3 kathas, in respect of which land the sale deed dated 5.2.1986 was executed, contending inter alia that the land measuring 7 bighas 4 kathas 2 lechas under Dag No. 540 of Khatian No. 225 in village Kakripara Part I under Circle Mankachar in the district of Dhubri originally belonged to Pannaullah, on whose death the plaintiff Nos. 1 to 6's father Goherul Haque and Ajiron Bewa inherited the said property being his son and daughter. It has also been pleaded that after the death of Goherul Haque the plaintiffs Nos. 1 to 6 being the sons and daughter have jointly inherited the share of Goherul Haque. It is also the pleaded case of the plaintiffs in the plaint that there was amicable partition amongst the heirs and the land described in Schedule 'B' measuring 5 bighas 1 katha 1 lecha fell in the share of the plaintiff Nos. 1 to 6, which included the land measuring 2 bighas 3 kathas described in Schedule 'C', which was purportedly transferred by the plaintiff No. 7 in favour of the defendant by executing the sale deed dated 5.2.1986. According to the plaintiffs since the plaintiff No. 7 has no right, title and interest in respect of Schedule 'C' land she cannot transfer the same and in fact she never executed such sale deed which has been created by the defendant fraudulently.

3. The defendant on receipt of the summons contested the suit and filed the written statements contending inter alia that out of the land measuring 7 bighas 4 kathas 2 lechas, belonging to Goherul Haque and Ajiron Bewa, land measuring 3 bighas 2 kathas 12 lechas were jointly sold by them to the defendant and thereafter Ajiron Bewa (plaintiff No. 7) by another sale deed dated 5.2.1986 sold 2 bighas 3 kathas in favour of the defendant. The defendant has also denied that the said sale deed dated 5.2.1986 is fraudulent as alleged by the plaintiffs in the plaint. According to the defendant the plaintiff No. 7, who is his mother, executed the sale deed, which was registered on 5.2.1986.

4. The learned trial court on the basis of pleadings framed the following issues for determination: -
\1. Whether the suit is maintainable in law as well as in form?
2. Whether the suit is abated as alleged?
3. Whether the suit is barred by limitation?
4. Whether there is any cause of action for the suit?
5. Whether the present suit is hit u/s 10 CPC?
6. Whether the plaintiff No. 7 executed the sale deed No. 122/86 and whether she has right, title interest over the suit land?
7. Whether the suit land is property of plaintiffs as their shares inherited from Late Goherul Haque alleged?
8. Whether the registered sale deed No. 122/86 dt. 5.2.1986 in question is a fraudulent one?
9. Whether the plaintiffs are entitled to get the decree as prayed for?
10. To what relief or relief are the parties entitled?\

5. During the pendency of the suit the plaintiff No. 7 died and tho ugh an application for bringing the legal heirs on record, apart from the defend ant, was filed together with the application for setting aside the abatement of the suit in so far as the plaintiff No. 7 is concerned, the same, however, has b een rejected and as such the plaintiff No. 7's name was struck of from the list of the plaintiffs in the suit.

6. The plaintiff Nos. 1 to 6 /appellants in support of their claim examined four witnesses and proved a number of documents. The defendant also exa mined three witnesses and proved a number of documents including the sale deed d ated 5.2.1986 as Ext. A.

7. The learned trial court upon appreciation of the evidences on re cord decreed the suit of the plaintiffs declaring right, title and interest in r espect of the Schedule 'C' land and also declaring the sale deed dated 5.2.1986 (Ext. A) as void and inoperative having obtained the same by fraud.

8. Being aggrieved, the defendant preferred Title Appeal No. 9/1999 before the learned first appellate, which has been allowed by the impugned judg ment and decree dated 5.3.2001 by reversing and setting aside the judgment and d ecree passed by the learned trial court. Hence the present appeal.

9. The appeal has been admitted for hearing vide order dated 1.8.20 01 on the following substantial question of law: -
1. Whether the learned lower appellate court having recorded a finding that plai ntiff No. 7 Ajiron Bewa sold excess land measuring 4K-10L by the registered Sale Deed No. 122/86 dated 5.2 86 was right in dismissing the suit on the ground tha t the plaintiff had failed to prove that the registered Sale Deed No. 122/86 as false and fraudulent ?

10. I have heard Mr. Sikdar, learned counsel for the appellants as w ell as Mr. Bhowmick, learned counsel appearing for the respondent.

11. Mr. Sikdar, learned counsel for the appellants referring to the findings recorded by the first appellate court has submitted that since it has b een found by the learned first appellate court that Ajiron Bewa, after the sale of 2 bighas 2 kathas 12 lechas of land jointly by Goherul Haque and Ajiron Bewa, would be entitled to 1 bigha 3 kathas 10 lechas of land being her 1/3 share, ac cording to the Mohammedan Law, the learned first appellate court ought to have d eclared the sale deed dated 5.2.1986 (Ext. A) as void and inoperative as by the said sale deed Ajiron Bewa sold the land measuring 2 bighas 3 kathas (Schedule C land), which is in excess of the land over which Ajiron Bewa derived title afte r the death of her father Pannaullah. The learned counsel submits that despite r ecording such finding by the learned trial court, the first appellate court has not considered the said aspect of the matter. It has also been submitted by the learned counsel that even if the finding recorded by the learned first appellate court that the sale deed dated 5.2.1986 (Ext. A) is not fraudulent, the learned first appellate court ought to have molded the relief and declared the right, t itle and interest of the appellants in respect of 4 kathas 10 lechas of land out of 2 bighas 3 kathas of land as described in Schedule 'C'. The learned counsel submits that the appellants are agreeable for a declaration of the right, title and interest in respect 4 kathas 10 lechas of land out of 2 bighas 3 kathas of l and described in Schedule 'C'.

12. Mr. Bhowmick, learned counsel appearing for the respondent has s ubmitted that since the learned first appellate court has recorded a finding tha t the plaintiffs could not prove that the sale deed dated 5.2.1986 (Ext. A) is f raudulent, the learned first appellate court has rightly set aside the judgment and decree passed by the learned trial court. Mr. Bhowmick, learned counsel, how ever, has submitted that the finding has been recorded by the learned first appe

llate court that Ajiron Bewa has sold 4 bighas 10 lechas more than the land to w hich she is entitled to by right of inheritance, by the Ext. A sale deed.

13. It appears from the judgment and decree passed by the learned fi rst appellate court that the plaintiffs could not prove that the sale deed dated 5.2.1986 (Ext. A) was fraudulent. The learned first appellate court having cons idered all the materials available on record and also keeping in view the fact t hat the said document is a deed of sale registered under the provision of the In dian Registration Act has recorded the finding that the sale deed is not fraudul ent.

14. The learned first appellate court, however, has recorded the fin ding that Ajiron Bewa being the daughter of Pannaullah would inherit 1/3 of the share under the Mohammedan Law. A finding has also been recorded, which has not been challenged, to the effect that Goherul Haque and Ajiron Bewa initially sold 2 bighas 3 kathas 12 lechas of land, out of Schedule A land, jointly to the def endant and out of the remaining land Ajiron Bewa would inherit 1 bigha 3 kathas 10 lechas of land but by Ext. A sale deed she transferred 2 bighas 3 kathas of l and and thereby transferred 4 kathas 10 lechas of land in excess of the land to which she is entitled to inherit under the Mohammedan Law. The learned first app ellate court having recorded such finding, which has not been challenged in the present appeal, ought not to have refused to pass the decree declaring the right , title and interest of plaintiff Nos. 1 to 6 in respect of 4 kathas 10 lechas, which is part of the schedule ’C’ land, even though the finding has been recorde d that the Ext A sale deed was not forged, as Ajiron Bewa having title in respec t of 1 bigha 3 kathas 10 lechas cannot sell more than that land. For the said re ason the defendant also cannot derive title in respect of more than 1 bigha 3 ka thas 10 lechas of land.

15. That being the position, the right, title and interest of the pl aintiff Nos. 1 to 6 in respect of 4 kathas 10 lechas of land out of the Schedule ’C’ land is declared.

16. Since no partition has been effected between the parties, it is open to the parties to amicably partition the land and in the event of failure t o do so they may initiate appropriate proceeding in that regard.

17. The appeal preferred by the appellants is partly allowed. No cos t. The suit of the plaintiffs is partly decreed in respect of 4 kathas 10 lechas of land which is part of 2 bighas 4 kathas of land described in Schedule ’C’.

18. The Registry is directed to draw a decree accordingly.

19. The Registry is also directed to send down the records forthwith .